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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC.,

Petitioner,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss petitioner's appeal is dated December 11, 1953 and reads as follows:

> "Motion granted. See *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254" (R. 22).

The opinion of the United States District Court for the Eastern District of New York denying petitioner's application for a stay pursuant to 9 USCA 3 appears in the

record (R. 21-22). Neither opinion has officially been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 11, 1953 (R. 22). The petition for a writ of *certiorari* was filed on March 8, 1954, and was granted on April 12, 1954 (R. 30). The jurisdiction of this Court rests upon 28 USCA 1254 (1).

Question Presented

Whether an order entered in an action in equity for an accounting denying defendant's motion to stay that action pursuant to 9 USCA 3 constitutes the denial of an interlocutory injunction within the meaning of 28 USCA 1292 (1).

Statutes Involved

28 USCA 1292 (1) (Judicial Code):

> "*Interlocutory decisions.*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, * * * ".

9 USCA 3 (U. S. Arbitration Act):

> "*Stay of proceedings where issue therein referable to arbitration.*

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Statement

The action herein is brought in equity for an accounting of the profits of a joint venture between respondent and petitioner (R. 6-13). The agreement between the respondent and petitioner concerning the said joint venture is in writing and is annexed to the complaint in the action (R. 14-21). The action was commenced by respondent in the Supreme Court of the State of New York, County of New York, and was removed at the instance of petitioner on the ground of diversity of citizenship to the United States District Court for the Eastern District of New York (R. 3). Petitioner, the defendant in the said action, served no answer or other pleading (R. 3), but instead made a motion for a stay of the action pursuant to 9 USCA 3 upon the alleged ground that the written agreement provided for arbitration of the matters in dispute (R. 2, 5). The District Court held there was no agreement to arbitrate (R. 21-22) and made an order denying petitioner's application for such stay (R. 5-6), from which order petitioner appealed to the United States Court of Appeals for the Second Circuit (R.

4). The Court of Appeals dismissed petitioner's appeal on the ground that the said order denying petitioner's application for a stay was not appealable (R. 22).

Summary of Argument

(1) The stay involved herein was intended to operate within the action in which it was sought and, therefore, failed to comply with the rule which requires that a stay operate against *another action* than the one in which it is sought in order to constitute an appealable injunction.

(2) The action herein being in equity and not at law, the stay does not qualify as an injunction under the *Enelow* and *Shanferoke* decisions, which require that the stay be based upon an equitable defense to an action of law and be directed against the latter, so as to support the concept of two actions, one staying another, within the above-stated rule.

ARGUMENT

I.

The Order Involved Herein Failed to Constitute the Denial of an Injunction, Since the Stay Was Intended to Operate Within the Action in Which It Was Sought and Was Not Directed at Another Action

Petitioner's contention is that the order denying its motion for a stay constituted the denial of an "injunction" and is appealable under 28 USCA 1292(1), which authorizes appeals from orders granting or denying "injunctions." It, therefore, becomes important at the outset to

ascertain the difference between a stay and an injunction. That difference has been firmly and clearly defined by a long line of decisions, and is well stated in *Emery* v. *Central Trust & Safe Deposit Co.*, 204 F. 965, 968, as follows:

> "We think an order refusing a stay of proceedings, made in a case other than that in which the stay is operative, amounts to a denial of an injunction, under the section invoked, but that an order refusing a stay, made in the case in which the desired stay would operate, would not amount to such denial of injunction."

Thus, it becomes clear that a stay does not amount to an injunction unless it reaches out of the action in which it is granted and stops proceedings in *another action.* That point appears to have been recognized as early as 1855 in the English case of *Croker* v. *Tempest*, 7 M. & W. 502. Decisions in recent years to the same effect are *United States* v. *Horns* (CA 2) (1945) 147 F. 2d 57, 60; *Cover* v. *Schwartz* (CA 2) (1940) 112 F. 2d 566; *Mottolese* v. *Preston* (CA 2) (1949) 172 F. 2d 308; *Dowling Bros. Distilling Co.* v. *United States* (CA 6) (1946) 153 F. 2d 353, 356; cert. den. 328 U. S. 848. In the last-named case it was said:

> "It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to a grant or refusal of an injunction."

In the case at bar, the stay sought by petitioner was to apply merely to the immediate action—the action in which the stay was sought—and not to another action. Accordingly, under the rule above the denial of petitioner's stay failed to amount to a denial of an injunction.

The above rule was applied by this Court to a special state of facts which permitted the concept that two separate actions—one at law and one in equity—were pending within the framework of a single case, so that a stay based upon an equitable defense to an action at law and directed against the latter was deemed a stay of "another action" within the said rule—and hence an injunction (*Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379; *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449).

The *Enelow* case involved an action at law to recover the proceeds of an insurance policy, to which the defendant interposed an equitable defense that the policy had been procured by fraud. The defendant then requested a trial of the equitable issues set up by its special defense in advance of the trial by a jury at law of the legal issues, pursuant to former Section 274b of the Judicial Code, which authorized the interposition of equitable defenses in an action at law and provided that "the defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea." The District Court granted the defendant's petition, the plaintiff appealed, and upon affirmance by the Court of Appeals this Court granted *certiorari*.

This Court, Chief Justice Hughes writing the decision, held that on the basis of the above-quoted language of former Section 274b and upon "the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity' ", the equitable defense interposed to the action at law constituted the equivalent of a separate bill in equity

and, therefore, a court of equity was staying another court of law and enjoining the latter's proceeding.

The *Enelow* decision made it clear that if the stay was not issued by a court of equity, or if it did not operate against an action at law, it would not amount to an injunction, because it would not support the fiction of one action staying another. Mr. Justice Hughes stated (293 U. S. at p. 382): "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129," (and at p. 383): "It is thus apparent that when an order or decree is made under § 274b requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The *Shanferoke* case, decided at the same time as *Enelow*, involved substantially the same special state of facts as presented by Enelow. In *Shanferoke* the action was at law to recover damages for breach of contract, to which the defendant by answer set up a special equitable defense based upon an arbitration agreement, and then made a motion to stay the action, pursuant to 9 USCA 3, until the arbitration should be had. The Court, expressly stating that its decision was based on the theory it had evolved in *Enelow*, held that the denial of defendant's motion for a stay was equivalent to the denial of an injunction (293 U. S. at p. 452): 'For the reasons stated in

Enelow v. *New York L. Ins. Co.* * * * an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under § 274b, U. S. C. title 28, § 398, is appealable under § 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of § 274b; and that the motion for a stay is an application for an interlocutory injunction based on the special defense."

Thus, in *Shanferoke,* this Court merely held that the arbitration stay in that case amounted to an injunction because, as in *Enelow,* it was directed against an action at law in furtherance of an equitable defense pleaded in the answer; and it seems plain from *Shanferoke* that if the arbitration stay, like any other stay, was sought under a state of facts which did not come within the *Enelow* concept, it would fail to constitute an injunction.

The precise limitations of the *Enelow* and *Shanferoke* decisions were emphasized in a decision made by this Court two months later in *Schoenamsgruber* v. *Hamburg Amer. Line,* 294 U. S. 454, which also involved the question of the appealability of an arbitration stay pursuant to 9 USCA 3. The action was in admiralty to recover damages for personal injuries incurred on defendant's steamship, and the answer set up a special defense that the contract of passage required the arbitration of all claims. The District Court granted defendant's motion for an order pursuant to 9 USCA 3 staying the action pending arbitration. The Court of Appeals dismissed the appeal from the order granting the stay, holding the same to be interlocutory and not appealable, and this Court granted *certiorari.* This Court

affirmed the holding of the Court of Appeals, pointing out (294 U. S. at p. 457) that neither *Enelow* nor *Shanferoke* was applicable, since each of the latter cases "was an action at law in which the defendant by answer sought equitable relief" and in each case "the order held appealable stayed proceedings on the law side and operated as an injunction * * * against proceedings in another court," whereas the *Schoenamsgruber* action was in admiralty. The *Schoenamsgruber* decision also pointed out (pp. 457-8) that admiralty courts "do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

Enelow and *Shanferoke,* if not implicity overruled by *Morgantown* v. *Royal Ins. Co.,* 337 U. S. 254, at least have had their precise limitations further emphasized by the latter decision. The *Morgantown* case involved the reverse of the *Enelow* situation. The *Morgantown* action was in equity and not at law (to revoke an insurance policy), and the counterclaim was at law and not in equity (to recover the proceeds of the policy). The defendant's motion, based on the legal counterclaim, for a jury trial of the action, was denied by the District Court, and defendant's appeal from the order denying its said motion was dismissed by the Court of Appeals as non-appealable, and this Court granted *certiorari.* In addition to the leading opinion in *Morgantown* affirming the ruling of the Court of Appeals, the language of Mr. Justice Frankfurter in his separate opinion concurring with the majority, makes plain the precise limitations of *Enelow* and, therefore, *Shanferoke* (337 U. S. at pp. 260-1):

> "The facts, therefore, are precisely the opposite of those in the *Enelow* Case. Here there was no inter-

vention by a court of equity in proceedings at law, but 'a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' 293 U. S. at 381, 382." • • •

"A layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable.

"The *Enelow* and *Ettelson* Cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves Enelow and Ettelson untouched."

The requirement that the action be at law is necessary to a case seeking to come within the *Enelow* concept that two separate actions—two sides of a court—are operating, one against the other, under the caption of a single case. Aside from the fact that both *Enelow* and *Shanferoke* were rationalized on the basis of former section 274b of the Judicial Code, which applied only to actions at law wherein equitable defenses or cross-bills were interposed, it further remains that an injunction may be granted only by a court of equity "in the enforcement of equitable principles" and "exercising what is essentially an equitable jurisdiction (293 U. S. at pp. 382-383)." Since an injunction may be

granted only in equity, it must be directed against the other side of the court—the law side—to permit the legal fiction that there are two actions present and that one is staying the other. If the action itself is in equity, and if the defense upon which the stay is based also is equitable, then there is only one indivisible action and no basis whatever for the legal fiction, necessary to *Enelow* and *Shanferoke*, of two actions, one operating against the other.

The action herein being in equity and not at law prevents the case at bar from coming within the *Enelow* and *Shanferoke* decisions. Petitioner's brief does not dispute, and its argument implicitly concedes, that the action herein is in equity. In any event, there should be no question that the action herein, for an accounting of the profits of a joint venture between respondent and petitioner, *is in equity* and not at law. *Valdes* v. *Larrinaga*, 233 U. S. 705, 709; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514-515. Rule 2 of the Rules of Civil Procedure removed some of the *procedural* distinctions between actions at law and those in equity, but the substantive distinctions between equitable and legal actions still stand (*Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368.

Petitioner implies that the requirement of *Enelow* and *Shanferoke*, that the action be one at law, should be disregarded as overly-technical. However, it was of just such technicalities that *Enelow* and *Shanferoke* were made, since without them there could not be created the concept necessary to said decisions, of two actions being present—one staying the other.

Petitioner appears anxious to dispose of *Enelow* by critically referring to it as creating a "fictional injunction"

and as having been set aside by *Morgantown*. However, whatever the merits or demerits of *Enelow* may be, it should be understood that respondent's position does not depend in any way upon *Enelow*. *Enelow* was merely engrafted upon the basic rule that a stay cannot qualify as an injunction unless it stays *another action*, and the passing of *Enelow* would leave intact that basic rule, which we contend is controlling herein.

Petitioner's attempt to rest its case upon *Shanferoke*, while seeking to have *Enelow* disregarded, must fail, since *Shanferoke* was expressly and completely based upon *Enelow* (293 U. S. at p. 452) and therefore would fall with *Enelow*. In any event, petitioner's stay does not come within either decision.

Therefore, the fact that the action herein is in equity, and not in law, renders *Enelow* and *Shanferoke* inapplicable and brings this case under the basic rule that a stay does not amount to an injunction unless it is directed at *another action* than the one in which it is granted.

II.

Answering Other Contentions of Petitioner

Petitioner stresses the fact that the decision of *Hudson Lumber Co.* v. *U. S. Plywood Corp.* (CA 9) 181 F. 2d 929, conflicts with the judgment of the Court of Appeals dismissing petitioner's appeal. An examination of the *Hudson Lumber Co.* case shows that the action stayed pursuant to 9 USCA 3 was in equity and not at law. However, the said decision fails completely to show upon what basis or by what process of reasoning the Court of Appeals for the

Ninth Circuit arrived at its perfunctory conclusion that the stay in that case was appealable as an injunction. It merely cited in the footnote (181 F. 2d at p. 930) the *Enelow* and *Shanferoke* cases and decisions of the Court of Appeals, *in all of which the actions sought to be stayed were at law.* The *Hudson Lumber* decision, therefore, appears to be based upon a misunderstanding of the *Enelow* and *Shanferoke* decisions and the other cases cited in its footnote, which misunderstanding may have been contributed to by the fact that no issue was raised in that case as to the jurisdiction of the appeal, jurisdiction having been perfunctorily conceded in appellee's brief. With the exception of the said *Hudson Lumber* case, we have found none in which a stay was deemed to come within the *Enelow* or *Shanferoke* cases, unless the action was at law. Thus, in *International Union* v. *Colonial Hardwood,* 168 F. 2d 33, *American Locomotive Co.* v. *Chemical Research Corp.,* 171 F. 2d 115, and *Markel Electric Prod. Inc.* v. *United Elec. Radio and Machine Workers, etc.,* 202 F. 2d 435, all cited by petitioner, each of the actions was at law to recover damages for breach of contract.

Petitioner argues that the *statutory nature* of an arbitration stay pursuant to 9 USCA 3 should differentiate it from other stays and constitute it as an injunction. However, the fact that a stay is based upon statute does not make it an injunction (*Carter* v. *Hodge,* 150 N. Y. 532, 537; *Thompson* v. *Savarosa Realty Corp.,* 73 N. Y. S. 2d 809). *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.* (CA 2) 126 F. 2d 978, 987, disputes the existence of any such differentiation, stating that an arbitration stay pursuant to 9 USCA 3 is "merely a stay order of a kind long familiar in common law, equity and admiralty actions." The *Schoen-*

amsgruber decision says of arbitration stays: "And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor (294 U. S. at p. 457).

Petitioner's contention that an arbitration stay is possessed of some unexplained qualities which constitute it an injunction *per se*, is expressly refuted by both the *Shanferoke* and *Schoenamsgruber* decisions. In *Shanferoke*, the arbitration stay was held appealable as an injunction only because the facts there came within the *Enelow* concept, since the stay was based on an equitable defense to an action at law and was directed against the latter, thereby staying *another action*. In the *Schoenamsgruber* case, however, the *Enelow* concept of two actions was lacking, since the action was in admiralty and not at law, and the stay was not based on equitable jurisdiction, and hence could not be deemed a stay of *another action*. Thus, *Schoenamsgruber*, like *Enelow* and *Shanferoke*, recognized and upheld the basic rule that an arbitration stay, like any other stay, does not constitute an injunction unless it is directed at *another action* than one in which it is granted.

Petitioner's argument that the arbitration stay should be deemed an injunction because it would have stayed the instant action in favor of the outside arbitration proceedings is precisely the reverse of the rule. As shown at the outset, the function of an injunction is to reach out of the instant action and stay the outside proceedings. *Dowling Bros. Distilling Co.* v. *United States* (CA 6) 153 F. 2d 353, 356 (cert. den. 328 U. S. 848) states: "It is only when the power possessed by a court of equity is exercised to stay

proceedings in another cause that such action amounts to a grant or refusal of an injunction." *Mottolese* v. *Preston, et al.* (CA 2) 172 F. 2d 308 holds that a stay which operates against the action in which it is issued pending the determination of other proceedings, is a non-appealable stay and not an injunction.

Petitioner also argues that to compel it to litigate the issues in this action because of the non-appealability prior to final judgment of the order involved herein would cause "procedural injury which could not be undone by an appeal from the final order." However, the federal appeal statutes do not authorize appeals from interlocutory orders simply because further litigation might be avoided by an appeal prior to final order. A denial of a motion to dismiss a complaint, even on jurisdictional grounds, is not reviewable before final judgment, despite the fact that an immediate review might obviate further litigation (*Catlin* v. *United States*, 324 U. S. 229, 236). The denial of a trial by jury, although highly important and involving a Constitutionally guaranteed right, does not authorize an immediate review, despite the fact that postponement of the right to appeal until final judgment may necessitate a retrial (*Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258).

It was the intent of Congress to forbid piecemeal appeals (*Cobbledick* v. *United States*, 309 U. S. 323, 325; *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258, 261; *Luxton* v. *North River Bridge Co.*, 147 U. S. 341; *Catlin* v. *United States*, 324 U. S. 229).

Petitioner's argument that "the function of arbitration would be defeated if the order is not immediately appealable" completely disregards the fact that the failure of

petitioner to obtain a stay of this action does not prevent it from doing anything it might have a right to do under the alleged arbitration clause. Indeed, petitioner's president, Frenkil, had the sole power to appoint the accountants to act under the said clause (R. 3, 18) and assuming *arguendo* that petitioner has any right to proceed with an arbitration, the lack of a stay cannot prevent it from doing so or from offering proof on the trial of this action of any resultant arbitral determination. A review of the final judgment can pass both upon the question of the right to arbitrate and the effect of any alleged arbitral determination upon the issues in this action.

The denial of an arbitration stay in this action has not delayed petitioner's alleged arbitration activities one iota. The stays petitioner has obtained from the District Court and this Court in connection with the question of an appeal from the order denying an arbitration stay, have stayed proceedings in this action for a period of approximately one year, during which petitioner could have conducted any alleged arbitration many times over if arbitration had been petitioner's purpose.

Petitioner's argument that respondent's selection of an equitable form of action instead of one at law deprives petitioner of a right of appeal (by preventing it from coming within the *Enelow* concept) ignores two facts: (1) That the allegations of the complaint show that the plaintiff could not have adequately established the rights and damages to which he was entitled without an equitable accounting (R. 9-13); (2) that if petitioner's motion for an arbitration stay had been granted instead of denied, respondent would have no right to appeal.

Conclusion

The order involved herein fails to constitute the denial of an interlocutory injunction within the meaning of Section 1292(1) of the Judicial Code. It is, therefore, respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

CHARLES WILSON,
Attorney for Respondent.